United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

77-7231

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

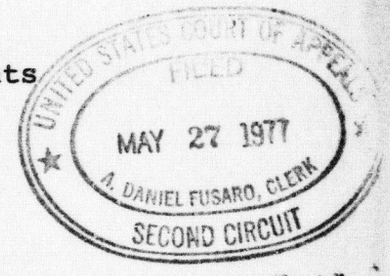
BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,
Plaintiffs-Appellees,

V.

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY, AND WILLIAM J. RONAN, W.
PAUL STILLMAN, JAMES G. HELLMUTH,
VICTOR R. YANITELLI, MILTON A. GILBERT,
HOWARD SCHULMAN, ROBERT F. WAGNER,
JAMES C. KELLOGG, III, LEWIS L. GLUCKSMAN,
JOSEPH F. CULLMAN, III, ALAN SAGNER,
Defendants-Appellants

and

TOWN OF HEMPSTEAD, INCORPORATED,
VILLAGE OF LAWRENCE, INCORPORATED
VILLAGE OF CEDARHURST, INCORPORATED
VILLAGE OF ATLANTIC BEACH, AND
ROBERT F. CHECK, MONA GOTTESMAN, AND
HERBERT WARSHAVSKY,
Applicants for Intervention-Appellants.



On Appeal From Order of United States District Court
for the Southern District of New York,
Judge Milton Pollack,
Denying Appellants' Motion to Intervene

BRIEF OF APPLICANTS FOR INTERVENTION-APPELLANTS

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CONSTITUTION

AMENDMENT V

*** Nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparge others retained by the people.

STATUTES

49 USC 1353(b)

The Administrator is empowered to undertake or supervise such developmental work and service testing as tends to the creation of improved aircraft, aircraft engines, propellers, and appliances. For such purpose, the Administrator is empowered to make purchases (including exchange) by negotiation, or otherwise, of experimental aircraft, aircraft engines, propellers, and appliances, which seem to offer special advantages to aeronautics.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE, Plaintiffs-Appellees v.	Nos.
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. YANITELLI, MILTON A. GILBERT, HOWARD SCHULMAN, ROBERT F. WAGNER, JAMES C. KELLOGG, III, LEWIS L. GLUCKSMAN, JOSEPH F. CULLMAN, III, ALAN SAGNER, Defendants-Appellants	77-7237 77-7249
TOWN OF HEMPSTEAD, INCORPORATED VILLAGE OF LAWRENCE, INCORPORATED VILLAGE OF CEDARHURST, INCORPORATED VILLAGE OF ATLANTIC BEACH, AND ROBERT F. CHECK, MONA GOTTESMAN, AND HERBERT WARSHAVSKY, Applicants for Intervention-Appellants	

TOWN OF HEMPSTEAD, ET AL.
BRIEF ON APPEAL

Town of Hempstead, et al* appeal from an Order of United States District Court for the Southern District of New York, Judge Milton Pollack presiding, denying their motion

*Town of Hempstead, et al, as hereinafter used refers to each of the applicants for intervention-appellants, jointly and severally.

to intervene pursuant to the provisions of Rule 24(a)(2)* of the Federal Rules of Civil Procedure. The motion was denied without the Court having read or considered the same.

ISSUES PRESENTED FOR REVIEW

1. Is it reversible error for the District Court to deny Town of Hempstead, et al. motion to intervene pursuant to Rule 24(a)(2) of the FRCP, on the ground that Town of Hempstead, et al. failed "to show good cause" for such intervention where the record discloses that:

a. The District Court held, on July 6, 1976, and was affirmed by the Court of Appeals on November 8, 1976, that Town of Hempstead, et al. prior motion to intervene satisfied all the requirements of Rule 24(a)(2) except that the Town of Hempstead, et al. failed to show that the Port Authority would not adequately represent the interests of the Town of Hempstead, et al., and therefore denied the same with leave to renew the motion "for good cause shown", and

b. The Port Authority is either unable or unwilling to represent the interests of the Town of Hempstead, et al. by declining to assert the un-

*Rule 24(a)(2) - When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that

(con't)

constitutionality of the proposed test operations of the Concorde aircraft at John F. Kennedy International Airport (JFK).

c. The proposed test operations of Concorde at JFK are offensive to the rights of the Town of Hempstead, et al. guaranteed by the Fifth and Ninth Amendments to the United States Constitution.

d. The unconstitutional nature of the test operations of the Concorde is dispositive of all of the issues raised in this motion for summary judgment.

e. There are material issues of fact that preclude the grant of a motion for summary judgment.

STATEMENT OF THE CASE

This is an appeal from an order entered on May 20, 1977, (67aa)* by Judge Milton Pollack of the United States District Court for the Southern District of New York denying the motion

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interest, unless the applicants interest is adequately represented by existing parties.

* (_ a) Refers to Joint Appendix

by the Town of Hempstead, three Incorporated Villages, and three individual residents, all located in close proximity to John F. Kennedy International Airport, for leave to intervene in an action brought by the airlines, British Airways Board and Air France, for declaratory relief and to enjoin the Port Authority of New York and New Jersey from enforcing its Resolutions prohibiting supersonic jet aircraft, including the Concorde, from using the facilities of JFK until six months operating experience of the Concorde at the Dulles International Airport has been evaluated by it.

On May 19, 1976, the Town of Hempstead, et al., moved to intervene in said proceedings as parties defendant. Judge Pollack in disposing of that Motion to intervene held that the Town of Hempstead, et al had satisfied the requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure with the exception of adequacy of representation. On July 6, 1976, Judge Pollack held that the Port Authority of New York and New Jersey would adequately represent the interests of the Town of Hempstead, et al., and denied the motion to intervene "without prejudice to renewal upon good cause shown". This order of the District Court was affirmed, without opinion, by the Court of Appeals on November 8, 1976*. The Town of Hempstead, et al. were invited by the

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*In the Court of Appeals it was British Airways Board, et al. v. Port Authority of New York, et al. No. 76-7339.

Court to participate as amici curiae, and did so by filing a brief in opposition to the grant of plaintiffs' motion for a summary judgment, by participating in oral argument (granted approximately five minutes time by Judge Pollack in an argument lasting over three and one-half hours) on April 28, 1977, and by filing a memorandum "In Extension of Oral Argument" on May 6, 1977.

On May 11, 1977, Judge Pollack filed a decision consisting of 31 pages, holding the resolution of the Port Authority invalid.

On May 20, 1977, a hearing was held before Judge Pollack to settle the order and judgment pursuant to said decision. Judge Pollack stated in open court the order and judgment to be entered on that day. Thereafter, the Town of Hempstead, et al., renewed its motion to intervene pursuant to the order of July 6, 1976. Judge Pollack, without ascertaining the content of said motion, summarily denied the same on May 20, 1977. (87a-88a).

It is from the District Court's summary denial of the Town of Hempstead, et al, motion to intervene that this appeal is taken.

RELEVANT FACTS

Judge Pollack's order of July 6, 1976, denying the first Motion of the Town of Hempstead, et al. to intervene was predicated upon the determination that:

> "The instant lawsuit will not resolve the merits of the supersonic aircraft, but simply the power and authority of a local airport to deny entry to a plane whose flights have been specifically approved by the federal government. The Port Authority would appear to have as great an incentive to safeguard the extent of its power from the instant challenge as would any of the proposed intervenors. The motion to intervene as of right must therefore be denied, although such denial shall be without prejudice to renewal in the event applicants can make a factual showing that the Port Authority is not vigorously litigating any aspect of the case". 35a - 38a
>
> (Mem. Order July 6, 1976)

The narrowness of this issue which, is to exclude the nature of the impact of the operations of the Concorde at JFK upon the Town of Hempstead, et al., according to Judge Pollack, is demonstrated by the Court's further holding:

> "This conclusion appears especially apposite to the instant case, for the applicants for intervention might well be tempted to focus their attention on the aspects of the Concorde's operations of greatest concern to them, as opposed to the narrow legal questions placed in issue by the pleadings in this action".
>
> (Mem. Order July 6, 1976)

Consequently, Judge Pollack held that the Port Authority could adequately represent the Town of Hempstead, et al. and denied the earlier motion to intervene. This, of course, was erroneous as later events proved.

It is significant that the earlier verified motion to intervene alleged that the operations of the Concorde aircraft at JFK would proximately cause irreparable harm, injury, and damage to the person and property of the Town of Hempstead, et al (Motion to Intervene Dated May 19, 1976, pars. 9, 10, 13 14 and 15). (15a - 19a) These allegations have been adopted and made part of the instant motion denied by Judge Pollack on May 20, 1977.

These allegations of irreparable injury and damage to the Town of Hempstead, et al. are the allegations that Judge Pollack strove mightily to, and did, improperly eliminate from the issues of the case, in spite of the efforts of the Town of Hempstead, et al.

On July 12, 1976, the plaintiffs filed their motion for summary judgment.

The parties took no discovery. The airlines and the Port Authority agreed that the matter was "ripe for summary judgment". It is obvious that efforts were being

made to tailor-make a record which would completely ignore the direct, immediate and substantial interests of the Town of Hempstead, et al. to be free from irreparable harm, injury and damage.

On April 28, 1977, at the oral argument, further steps were taken by Judge Pollack to tailor-make a record ignoring the rights and interests of the Town of Hempstead, et al.,who posed the following questions, first to counsel for the airlines and then to the counsel for the Port Authority:

> "THE COURT: Isn't it true that I am not being asked to decide whether the noise level of the Concorde is tolerable, or not acceptable, nor whether the aircraft should or should not be given a chance to prove itself?
>
> "MR. NICKLES: Absolutely, your Honor. I think, as you said --
>
> "THE COURT: If that is so who is going to decide it as long as the contending parties are passing it around among each other and to me?"
>
> (Oral Hearing April 28, 1977, pp 34-35)
>
> * * * *
>
> "THE COURT: Just let me interrupt once more. Are you in agreement with Mr. Wells or perhaps Mr. Nickles that the Court is not asked to decide whether the noise level of the Concorde is tolerable or not acceptable, nor whether the aircraft should be given a chance to prove itself?
>
> "MR. FALVEY: Not at this time your Honor.

"THE COURT: Those are matters solely for the governmental agency, isn't that correct?

"MR. FALVEY: That is correct."

(Oral Hearing April 28, 1977, p. 92)

These concessions by the airlines and the Port Authority counsel, at the request of the Court, effectively developed a record which purports to furnish a basis for the disposition of constitutional issues adversely affecting over one-half of a million citizens and without the slightest recognition of their rights and interests.

On May 11, 1977, Judge Pollack, in his decision, found and held that Secretary Coleman, acting pursuant to the authority of 49 USC 1353(b), authorized experimental test operations of the Concorde at JFK, and this was in "irreconcilable conflict" with the Port Authority resolution (MS Dec. pp. 29 and 31).*

These experimental tests of the Concorde which the Court holds "are the only subject matter ruled on by the Secretary and banned by the Port Authority" (MS Dec. p. 31), were designed to obtain data to determine the bounds of tolerance of the residents near JFK to the noise, vibrations, and pollutants emitted by the Concorde.

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*(MS Dec. p) refers to Judge Pollack Decision of May 11,1977.

This is described by the District Court as, "the need for actual operating data, the catalyst for the experimental test operations at JFK", ** (MS Dec. p. 27).

In short, the District Court has determined it to be legal and proper to use approximately 450,000 citizens as human guinea pigs to determine their reaction and tolerance to the test operations of the Concorde at JFK, in spite of their opposition, lack of consent, and sworn allegations, of irreparable harm, injury and damage to them resulting therefrom, as set forth in their verified motion (55a) to intervene filed May 20, 1977, and denied by the District Court (Motion pp. (44a, 45a, 15a-19a, 55a) affidavit of Lewis Par. 6). Such action denies the rights of the Town of Hempstead, et al. guaranteed by the provisions of the Due Process Clause of the Fifth Amendment and by the Ninth Amendment to the U.S. Constitution.

That the motion of the airlines for summary judgment is premature is clearly established by the "Memorandum In Opposition To Motion For A Stay Pending Appeal" filed by the airlines in this Honorable Court. Said Memorandum devotes pages 3,5,6 and 7 to denying that such experimental test operations of the Concorde "pose a genuine risk of injury" (p. 7). Recognizing the fact that the danger is present in

these experiments, they assert that "ample safe-guards are present" (p. 7), or that "federal authorities have established an elaborate mechanism to monitor and, if appropriate, to halt Concorde flights" (p. 5).

The Town of Hempstead, et al, have pleaded in their motion that they will be irreparably harmed, injured and damaged by these experimental tests in denial of their constitutional rights. The airlines say "No, you will be safe guarded". Such a factual conflict as that described and which in reality exists is not the proper basis for the grant of a summary judgment.

The District Court in grounding its decision on the Secretary's authority to authorize and conduct experimental test operations of the Concorde at JFK under 49 USC 1353(b), has, unwittingly for sure, expanded the issues so as to include the question of whether the conduct of these tests purusant to the Secretary's amendment of the operations specifications of the airlines, offends the constitutional requirements of the Fifth and Ninth Amendments to the U.S. Constitution.

These defenses are set forth in Town of Hempstead, et al. motion to intervene denied by Judge Pollack on May 20, 1977, (Motion pp (39a-58a)).

The Port Authority, the alleged advocate and protector of the lawful interests and rights of the Town of Hempstead, et al, only by the judicial fiat of Judge Pollack (July 6, 1976 Order), either cannot or will not assert these constitutional defenses in this action (Motion par. (40a, 41a, 47a, 55a)). Counsel for the Port Authority informed counsel for the Town of Hempstead et al. that the Port Authority would not assert said defenses. Such conduct effectively deprives the Town of Hempstead, et al. of any representation of their interests in this litigation. It necessarily follows that the Port Authority is "not vigorously litigating" this aspect of the case which is a duty imposed by the District Court. "Good Cause" for intervention does exist and the motion to intervene should have been granted by Judge Pollack.

The District Court committed reversible error in denying the Town of Hempstead, et al. motion to intervene.

A R G U M E N T

I.

IT WAS PREJUDICIAL ERROR TO GRANT THE MOTION FOR SUMMARY JUDGMENT OR TO REFUSE TO VACATE IT

Coxsey v. Hallaby, 334 F2d 286, 287 (10 Cir.1964).

In the Coxsey case the plaintiffs residents of Oklahoma City brought an action in the State court against

Hallaby, the Federal Aviation Administrator, and Officers of the Air Corps of the United States to enjoin them from engaging in experimental tests to determine the bounds of tolerance of the inhabitabts of Oklahoma City to sonic boom created by SST aircraft, not unlike the Concorde. The state court granted an ex parte injunction and the defendants removed the case to the United States District Court. There the defendants alleged that they were conducting these tests pursuant to 49 USC 1353 (b) [the same provision relied upon by Judge Pollack] and moved for dismissal and for summary judgment. The District Court granted the motions even though the plaintiffs had alleged (as did the Town of Hempstead, et al. in the case at bar) that in the course of conducting these tests the aircraft generated shock waves which damaged "properties of the plaintiffs and affect the health and well-being of the plaintiffs" causing irreparable damage.

On appeal the Court of Appeals held:

> "We reverse the judgment. From our examination of the record we are satisfied that the suit cannot, at this point, be said to be one against the United States brought without consent, nor can it be determined that the activities of appellees-defendants are unqualifiedly valid because of the general authority granted the Federal Aviation Agency (49 USC 1353 b) to develop and study supersonic air transportation. Nor do we believe the case to be ripe for summary judgment.

> Speaking generally, the public must submit to inconvenience and discomforture caused by legitimate governmental activities which do not offend constitutional requirements. Here we have allegations of damage to property and injury to health. The defendants say that such claims are compensable, may be satisfied in monetary damages, and do not offend the due process requirements. The plaintiffs insist that they have been damaged to such an extent and in such manner that the Constitution has been violated. In our opinion the case presents a genuine issue over material facts and cannot be decided in summary judgment proceedins".

The Coxsey case is on all-fours with the issues in the case at bar. The constitutional rights of the plaintiffs to be free from irreparable injury and damage to person and property as well as not to be used as human guinea pigs in boom experiments involving sonic are recognized and protected by the Court of Appeals for the 10th Circuit. There is no reason why the law should be any different in this Circuit.

The original motion of the Town of Hempstead, et al. dated May 19, 1976, denied by Judge Pollack, presented the same allegations of irreparable harm and injury. Yet Judge Pollack improperly excluded such matter as issues.

Again, the renewed motion filed on May 20, 1977, contained the same allegations, adopted from the earlier

motion, as well as additional allegations specifically alleging a denial of rights under the Fifth and Ninth Amendments (Motion par. (40a - 41a)). A motion, seeking to vacate the judgment of Judge Pollack under Rule 59, required by the provisions of Rule 24, accompanied the Town of Hempstead, et al. motion to intervene. This motion to vacate the judgment under Rule 59 alleged the same constitutional violations above described. (59a - 67a)

The proposed test operation of the Concorde at JFK constitutes an unreasonable intrusion by governmental power into the lives of over one-half of a million people, and is therefore unconstitutional. The severity of the consequences proximately flowing from this test operation makes it vicious, inhuman, improper, and thoroughly unacceptable, as alleged in the motion of Town of Hempstead, et al (Rule 59 Motion (66a) par. 15).

Indeed, Judge Pollack recognized that these experimental test operations of the Concorde were subject to challenge on these grounds. But Judge Pollack stated that,

> "**Nobody is complaining here about the circumstances or the time, all that the Port Authority is saying is, I want to take a look for myself.
> "They are not saying that there is anything vicious or improper about these four minute takeoffs ***. If that is so, then it seems to me that, as we have done in all cases coming into the federal court, we are prone to say

> give them a chance to prove or disprove what is going on, and if that chance to prove or disprove what is going on is not so bad that it is on its face something that is thoroughly unacceptable, I hesitate to believe that the Town of Hempstead or the Port Authority can contradict the Federal Government in its appreciation of what is good for the national good".
> (Oral Hearing pp. 134-135).

Judge Pollack rightfully pointed out that "nobody is complaining here" about the manner of conducting these test operations of the Concorde because the Port Authority declined to do it. The Town of Hempstead, et al, tried to do it by intervention, but were prevented by the denial of their motion to intervene on two occasions. As an amicus curiae the Town of Hempstead, et al are precluded from filing, pleadings that establish the issues. The amicus has to take the record as it is made by the parties.

The Town of Hempstead, et al, if given the opportunity, expect to show that such test operations of the Concorde are vicious, inhuman, improper and totally unacceptable. To refuse to let this be done with respect to an issue affecting hundreds of thousands of people constitutes a grave miscarriage of justice.

As a practical matter, deciding grave and far reaching constitutional issues which directly and substantially affect the rights of the Town of Hempstead, et al., upon a tailor-made record in which "nobody is complaining", because the District Court has Wrongfully prevented the Town of Hempstead, et al., from "complaining", is the rankest form of denial of Fifth Amendment due process both as to substance and procedure. The individuals, Check, Gottesman, and Warshavsky, are being damaged and injured in their person the same as the plaintiffs were in the Coxsey v. Hallaby Case (supra).

These individuals are also being deprived of their rights under the Ninth Amendment by being used, without their consent, as human guinea pigs to determine the bounds of human tolerance to the noise, vibration, and pollutants of the Concorde. Secretary Coleman, when he authorized these tests of the Concorde, knew that the residents would be injured. The Secretary wants to find out just how much injury and damage will they tolerate. Check, Gottesman, and Warshavsky object to this vicious, inhuman, and intolerable intrusion upon their personal rights and liberties. There must be and is a better way to obtain a determination of this search for knowledge.

The airlines have denied that the operations of the Concorde will produce such intrusion upon the person and property of these individuals (Memo of airlines pp 3,5-7, filed in this Court in opposition to motion for stay, May 24,1977).

This denial, although not in the pleadings, is, again, a reality, a fact of life that is being excluded from this tailor-made record. The airlines' denial of the viciousness of these proposed experimental test operations creates genuine issues of material fact which demand the denial of the airline's motion for summary judgment.

Important constitutional questions should not be decided except upon a full record and after adequate hearing - Braden v. Univ. of Pittsburg, 477 F2d 1 (3Cir. 1973).

In Polk Company v. Glover, 305 U.S. 5, 9-10 (1938) the Supreme Court of the United States held:

> "We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove this case, if they could, and that the court should not have undertaken to dispose of the constitutional issues in advance of that opportunity. ***The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable. See Bordens Farm Products v. Baldwin 293 U.S. 194 211-213 and cases cited. And that determination requires a hearing in due course upon issues raised by the pleadings".

In Carter v. Stanton 405 U.S. 669, 671 (1971) the Supreme Court made it perfectly clear that Rule 56 of the FRCP means precisely what is says - under Rule 56, summary judgment cannot be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

The application of these fundamental principles are determinative of the case at bar. The record in the case at bar is grossly inadequate to properly present the true issues that are actually involved. The case should be remanded in order that a correct and lawful record may be developed before deciding issues of such grave significance.

The Court below has thwarted all efforts of the Town of Hempstead, et al. to develop a record which will depict for this Honorable Court the facts of life upon which the constitutional issues which exist should be decided. While it is true that generally the parties to a litigation should be able to settle their disputes upon a record of their own choice, this right takes on another dimension when the disposition of that private dispute has a direct and serious impact upon the rights of literally hundreds of thousands of citizens and a less direct, though substantial, impact upon millions of people.

This consideration can find protection only when the persons affected thereby are given an opportunity to assert their interest and be heard in support thereof. Up to this state of the proceedings there has been a miserable failure to protect these interests.

It should never be forgotten that the Fifth and Ninth Amendments protect against any activity by the federal government which would interfere with or contract expressed or nonexpressed rights of its citizens - See Roe v. Ingraham 480 F2d 102, 107 (2Cir.1973).

II.

TOWN OF HEMPSTEAD ET AL ARE ENTITLED TO INTERVENTION AS A MATTER OF RIGHT

It has been held that the motion to intervene of the Town of Hempstead, et al., satisfy the "interest" requirement and the "impairment of ability to protect" requirement of Rule 24(a)(2) of the FRCP granting intervention as a matter of right (Judge Pollack Order of July 6, 1976). That is the law of the case. It is consistent with the principles enunciated by this Court in New York Pub. Int. Research Group v. The Regents of New York University 516 F2d 350, 351-352 (2 Cir. 1975). Other cases to the same effect are Nuesse v. Camp

385 F2d 694 (D.C.Cir.1967); General Motors v. Burns 50 F.R.D. 401,403-404 (DC Hawaii 1970); Diaz v. Southern Drilling Corp. 427 F2d 1118, 1124 (5Cir.1970); Ford Motor Co. v. Bisanz Bros. Inc. 249 F2d 22, 28 (8Cir.1957); Atlantic Refining Co. v. Standard Oil 304 F2d 387, 394 (8Cir.1962); Martin v. Travelers Ins. Co. 450 F2d 542,554 (5Cir.1971); Textile Workers Union of America v. Allendale Co. 226 F2d 765 (DC Cir.1955); Kozak v. Wells 278 F2d 104 (8Cir.1960); Holmes v. Gvt. of Virgin Is. 61 F.R.D. 3; and Atlantic Devel. Corp. v. U.S. 379 F2d 818,826 (5Cir.1967).

The only requirement of Rule 24(a)(2) that Judge Pollack held was not satisfied by the motion to intervene of of the Town of Hempstead et al., was the "representation" requirement. (37a-38a). Judge Pollack held that the Port Authority could adequately represent the interests of the Town of Hempstead et al. Indeed, Judge Pollack invited the Town of Hempstead, et al to come back and revew the motion upon "a factual showing that the Port Authority is not vigorously litigating any aspect of the case." (37a)

The factual showing of "not vigorously litigating any aspect of the case" consists in the undisputed showing that the Port Authority is either unable or unwilling to assert the valid constitutional defenses described above.

Certainly no representation embraces the requirement of the Rule 24 of not being "adequately represented".

This is particularly true in the light of the Supreme Court's interpretation of this requirement of the Rule that:

> "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal."

Trbovich v. United Mine Workers 404 U.S. 528,538 fn. 10(1972).

Counsel for the Port Authority were asked to raise these constitutional issues and declined to do so. It is inconsistent with the Port Authority's position of raising any issues of material fact. Regardless of whatever reason there may be for not raising these valid and dispositive constitutional defenses, it is perfectly clear that the interests of the applicants for intervention-appellants are not being represented by the Port Authority. Nor are these interests being "vigorously litigated" by the Port Authority.

The conclusion inescapably follows that "good cause" has been shown and it was prejudicial error for the District Court to deny the motion to intervene.*

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*The matter of complying with all of the requirements of Rule 24(a)(2) including the procedural aspects of 24(c) has been extensively briefed in the original and reply briefs of the Town of Hempstead, et al., in their appeal to this Court from the order of the District Court denying intervention on July 6,

(con't)

CONCLUSION

The Order of the District Court should be reversed and the Town of Hempstead, et al., should be permitted to intervene to assert the constitutional defenses of deprivation of rights guaranteed by the Fifth and Ninth Amendments to the Constitution.

The Order of the District Court granting summary judgment should be reversed and the case remanded for an evidentiary hearing on the Constitutional issues presented to it as was done in Coxsey v. Hallaby (supra).

Respectfully submitted,

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Dated: May 27, 1977

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1976. This Order was affirmed without opinion on November 8, 1976, under the No. 76-7336. Copies of such briefs are available.